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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO.814 OF 2007**

Dhanraj Kop Shetty ...Appellant
V/s.
The Municipal Corporation of Greater Mumbai & Ors. ...Respondents

Mr.R.A. Thorat and Mr.P.J. Thorat, Advocates, for the Apellant.

Mr.B.H. Mehta, Advocate, for the Respondents.

**CORAM : ABHAY S. OKA, J.**
**DATE : 1ST NOVEMBER, 2007.**

**JUDGMENT :**

1. Admit.

2. Advocate for the 1st respondent waives service. The learned AGP waives service for 2nd and 3rd respondent.

3. The appellant is the original plaintiff who has taken exception to the order dated 11th October, 2007 passed by the Trial Court by which Notice of Motion taken out by the appellant has been dismissed.

4. The suit filed by the appellant alleges that

the appellant is in occupation of a structure which is more particularly described in paragraph No.1 of the plaint. The Suit is simplicitor for perpetual injunction restraining the respondents from demolishing the suit structure without following due process of law. The impugned order discloses that when the Notice of Motion was decided, reply was not filed by any of the respondents.

5. The learned Judge recorded a finding that there was no evidence on record to show that the suit structure was in existance prior to 1st January, 1995 except an agreement dated 14th February, 1994. On this ground the Notice of Motion has been dismissed.

6. I have heard the learned Advocates appearing for the parties. The learned AGP states that the suit structure in respect of which the present Suit is filed was demolished by the 2nd and 3rd respondents and thereafter the appellant-plaintiff has unauthorisedly reconstructed the same.

7. It must be, however, stated that the 2nd and 3rd respondents-defendants did not file a reply to the Notice of Motion. If what is stated across the Bar by the learned AGP is correct, it would be certainly a

relevant consideration while deciding the prayer for grant of interim reliefs. In absence of the reply and no material being placed on record by the respondents-defendants, the learned Trial Judge was not justified in rejecting the prayer for injunction on the ground on which he has rejected the same.

8. Considering the stand taken by the learned AGP this is a fit case where an opportunity deserves to be granted to the respondents-defendants to file a reply to the Notice of Motion. Therefore, the impugned order deserves to be set aside with a direction to the Trial Judge to decide the same afresh. Hence I pass the following order :-

**"O R D E R"**

(i). The impugned judgment and order dated 11th October, 2007 is quashed and set aside and the Notice of Motion No.1734 of 2006 is restored to the file.

(ii). The respondents-defendants will file reply to the Notice of Motion on or before 7th December, 2007. The Notice of Motion shall be disposed of as expeditiously as possible and preferably before the end of the year.

(iii). It will be open for the 2nd and 3rd respondents-defendants to take out photographs of the suit structure as of today and to place the same on record of the Trial Court alongwith an affidavit of the photographer.

(iv). Till the Notice of Motion is finally decided, the respondents-defendants will not take any action of demolition without following due process of law. This protection is granted subject to condition that the appellant-plaintiff will maintain status-quo in all respects in respect of the suit structure till the disposal of the Notice of Motion.

(v). All contentions of the parties on merits of the pending Notice of Motion are expressly kept open.

(vi). The Appeal is allowed in the aforesaid terms with no order as to costs.

(vii). Parties and the Trial Court to act upon an authenticated copy of this order.

**[ABHAY S. OKA, J.]**